

The opinion in support of the decision being entered today is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LINDA M. DORSCHNER

Appeal 2007-2409
Application 10/034,846
Technology Center 3700

Decided: September 6, 2007

Before DEMETRA J. MILLS, ERIC GRIMES,
and RICHARD M. LEOVITZ Administrative *Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 83-89, 91-92, 100-102 and 106-111, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

Representative claims follow.

107. A disposable absorbent article having a longitudinal axis, a lateral axis, and a lateral centerline generally defining longitudinal front and back regions of the article, said article having a front end and a back end, said article comprising:

- a liner adapted for contiguous relationship with a wearer's body;

- an outer cover in generally opposed relationship with the liner, the outer cover having a length and a width and being stretchable along substantially the entire length of the outer cover;

- the article having a surface area defined at least in part by said outer cover; and

- an absorbent core disposed between the liner and the outer cover and having a front edge, a back edge, and a surface area which is less than about 50% of the surface area of the article, the front edge of the absorbent core being in a closer proximity to the front end of the article than the back edge of the absorbent core is to the back end of the article, at least a portion of the absorbent core being bonded to said outer cover.

109. A disposable absorbent article having a longitudinal axis, a lateral axis, and a lateral centerline generally defining longitudinal front and back regions of the article, said article having a front end and a back end and comprising:

- a liner adapted for contiguous relationship with a wearer's body, the liner having a length and a width and being stretchable along substantially the entire length of the liner;

- an outer cover in generally opposed relationship with the liner;

- the article having a surface area defined at least in part by said liner; and

- an absorbent core disposed between the liner and the outer cover and having a front edge, a back edge, and a surface area which is less than about 50% of the surface area of the article, the front edge of the absorbent core being in a closer proximity to the front end of the article than the back edge of the absorbent core is to the back end of the article, at least a portion of the absorbent core being bonded to said liner.

111. A disposable absorbent article having a longitudinal axis, a lateral axis, and a lateral centerline generally defining longitudinal front and back regions of the article, said article having a front end and a back end and comprising:

a liner adapted for contiguous relationship with a wearer's body;

an outer cover in generally opposed relationship with the liner, at least one of said liner and said outer cover being stretchable in at least one direction, the article having a surface area defined at least in part by at least one of said liner and said outer cover; and

an absorbent core disposed between the liner and the outer cover and having a front edge, a back edge, and a surface area which is less than about 50% of the surface area of the article, the front edge of the absorbent core being in a closer proximity to the front end of the article than the back edge of the absorbent core is to the back end of the article, said at least one of said liner and said outer cover extending beyond the front and back edges of the absorbent core and being stretchable adjacent said front and back edges.

Cited References:

Roe	US 5,904,643	May 18, 1999
Clear	PCT WO 96/18367	June 20, 1996
Morman	PCT WO 00/33913	Dec. 21, 1999
Divo	EP 0 650 714 A1	May 3, 1995

Grounds of Rejection¹

Claims 83-89, 91-92, and 106-111 under 35 U.S.C. § 102(b) as anticipated by Clear.

¹ The Answer on pp. 2-3 also notes that there are two additional grounds of rejection not withdrawn by the Examiner but not under review on appeal as they were not presented for appeal by Appellant in the Brief. These grounds are a rejection of claim 90 for obviousness over Morman and Clear (Answer 3) and a rejection of claim 93 for obviousness over Roe in view of Divo.

Claims 83-89, 91-92, 100-102, and 106-111 under 35 U.S.C. § 102(b) as anticipated by Roe.

We reverse.

DISCUSSION

Anticipation - Clear

Claims 83-89, 91-92, and 106-111 under 35 U.S.C. § 102(b) as anticipated by Clear. We select claim 107 as representative of the rejected claims.

Claim 107 specifically requires, in addition to the other claimed elements, that

the article have a surface area defined at least in part by said outer cover; and an absorbent core disposed between the liner and the outer cover and having a front edge, a back edge, and a surface area which is less than about 50% of the surface area of the article, the front edge of the absorbent core being in a closer proximity to the front end of the article than the back edge of the absorbent core is to the back end of the article, at least a portion of the absorbent core being bonded to said outer cover.

With respect to Claims 107-111, the Examiner refers to Fig. 1 of Clear, which is reproduced below.

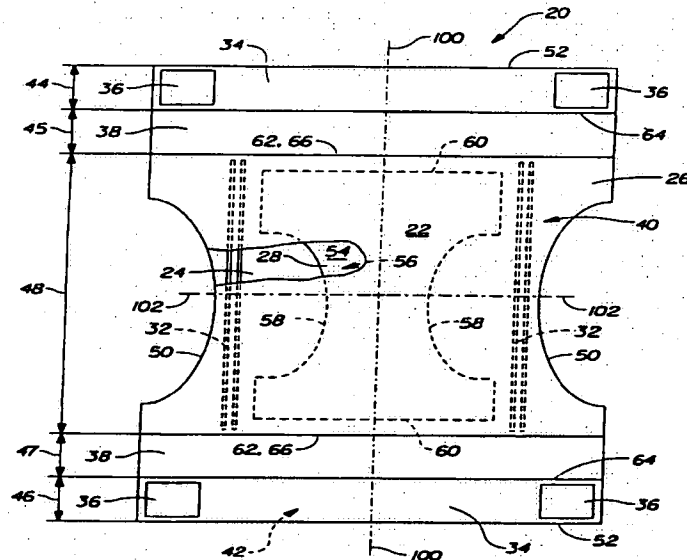


Fig. 1

Figure 1 shows a configuration of the diaper assembly of Clear. Referencing Figure 1, the Examiner finds that the surface area of core 28 is less than or equal to "about" 50% of the surface area of the article, liner is 24, cover is 26 and "the terminology 'about' allows some leeway from the dimension it describes." (Answer 5.) "With regard to the front edge being closer to the front end than the back edge is to the back end, see page 13, lines 12-15 and page 12, line 15-page 13, line 2, as well as the paragraph bridging pages 6-7" where it is stated that the fit panel may be 1:5 to 2 times the longitudinal length of the fit panel in the front region. (Answer 5.) With regard to the stretchability of the cover along substantially the entire length and/or width thereof, the Examiner refers to elements 32, 34 and 38 of Fig. 1 above, and the sentence in Clear bridging pages 12-13, page 13, line 17 and page 14, lines 14-15, and 25-33 describing the elasticity of the fit region. (Answer 5.)

Appellant contends that Clear does not disclose the position of the front edge of the article and the position of the back edge of the absorbent

core relative to the back end of the article other than that the absorbent core ends are certainly spaced inward from the front and back edges of the article.

(Br. 8.) Appellant argues that the

[o]nly evidence of record regarding the positions of the front and back ends 52 of the article relative to the front and back edges of the absorbent core 28 of the article of Clear et al. is provided by Figures 1 and 2 thereof. In both embodiments the front and back fit panels 38 are of equal length and the front and back edges of the absorbent core are equidistant from the respective front and back ends of the article.

(Br. 11.)

We agree with Appellant that upon careful review of Figures 1 and 2 of Clear, and Clear's supporting specification, it reasonably appears that the front and back edges of the absorbent core are equidistant from the respective front and back ends of the article. While Clear does indicate that the fit panel in the rear fit region may be 1:5 to 2 times the longitudinal length of the fit panel in the front region (Clear, 13), what remains unclear is whether when the length of the rear fit panel is increased, the longitudinal center line (102 of Fig. 1) is similarly adjusted. We have no evidence of record suggesting that the longitudinal center line or the core region of the diaper is repositioned when the size of the rear fit panel is altered. The Examiner did not provide any evidence of how the core would be placed when the size of the rear panel is altered. Thus, there is no evidence that the claimed arrangement of claim 107 would necessarily occur, following Clear's disclosure. Inherent anticipation requires that the claimed subject matter "necessarily and inevitably" occur. *See Schering Corp. v. Geneva Pharmaceuticals*, 339 F.3d 1373, 67 USPQ2d 1664 (Fed. Cir. 2003).

The standard under § 102 is one of strict identity. "Under 35 U.S.C. § 102, every limitation of a claim must identically appear in a single prior art reference for it to anticipate the claim." *Gechter v. Davidson*, 116 F.3d 1454, 1457, 43 USPQ2d 1030, 1032 (Fed. Cir. 1997). "Every element of the claimed invention must be literally present, arranged as in the claim." *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

We do not find that Clear teaches an absorbent core wherein the front edge of the absorbent core is in a closer proximity to the front end of the article than the back edge of the absorbent core is to the back end of the article. Thus, the rejection of the claims for anticipation over Clear is reversed.

Anticipation – Roe

Claims 83-89, 91-92, 100-102 and 106-111 are rejected under 35 U.S.C. § 102(b) as being anticipated by Roe. We select claim 107 as representative of the rejected claims.

The Examiner finds that

Figures 1 and 3-4, col. 4, lines 43-50, col. 6, lines 20-26 and 29-35, col. 22, Table 1, Sample X, col. 22, lines 56 et seq, col. 23, lines 5-9, col. 25, lines 19-45, [show] i.e. surface area of core 28 is less than or equal to "about" 50% of the surface area of the article, liner is 24, cover is 26. ... With regard to the front edge being closer to the front end than the back edge is to the back end, see col. 4, lines 43-50 and Figures 1 and 3-4. The surface area of the portion of the core which extends into the front half of the article has a surface area which is less than about 30% of the surface area of the front half of the article, see again col. 23, lines 5-9. It is noted the article includes both the chassis 22 and

the belt 32. With regard to the stretchability of the liner and cover along substantially the entire length and/or width thereof, or "adjacent" front and back edges of the core, see ... col. 4, lines 43-50, i.e. spaced but yet "adjacent", col. 10, lines 22-52 ..., element 30, col. 11, lines 19-39, col. 25, lines 19-45 ... i.e. the waist belt can include the cover and liner of the chassis, the lateral edge in the first waist region as well as the entire side edges can be elasticized.

(Answer 6-7.)

The standard under § 102 is one of strict identity. "Under 35 U.S.C. § 102, every limitation of a claim must identically appear in a single prior art reference for it to anticipate the claim." *Gechter v. Davidson*, 116 F.3d 1454, 1457, 43 USPQ2d 1030, 1032 (Fed. Cir. 1997). "Every element of the claimed invention must be literally present, arranged as in the claim." *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

We do not find the Examiner has established a prima facie case of anticipation of the claimed subject matter. Appellant argues that Roe fails to teach a stretchable cover. (Br. 15.) We agree with Appellant that Roe fails to teach a stretchable outer cover being stretchable in at least one direction, as claimed.

According to the Specification, "the term 'stretch,' or 'stretchable' refers to a material that is either elastic or extensible. That is the material is capable of being extended, deformed, or the like, without breaking, and may or may not significantly retract after removal of an extending force."

(Specification 5.) The term "extensible" refers to a "*property of a material* where upon removal of an extending force, it provides substantially

permanent deformation and/or does not exhibit a significant retractive force.” (*Id.*)

Figure 1 of Roe is reproduced below:

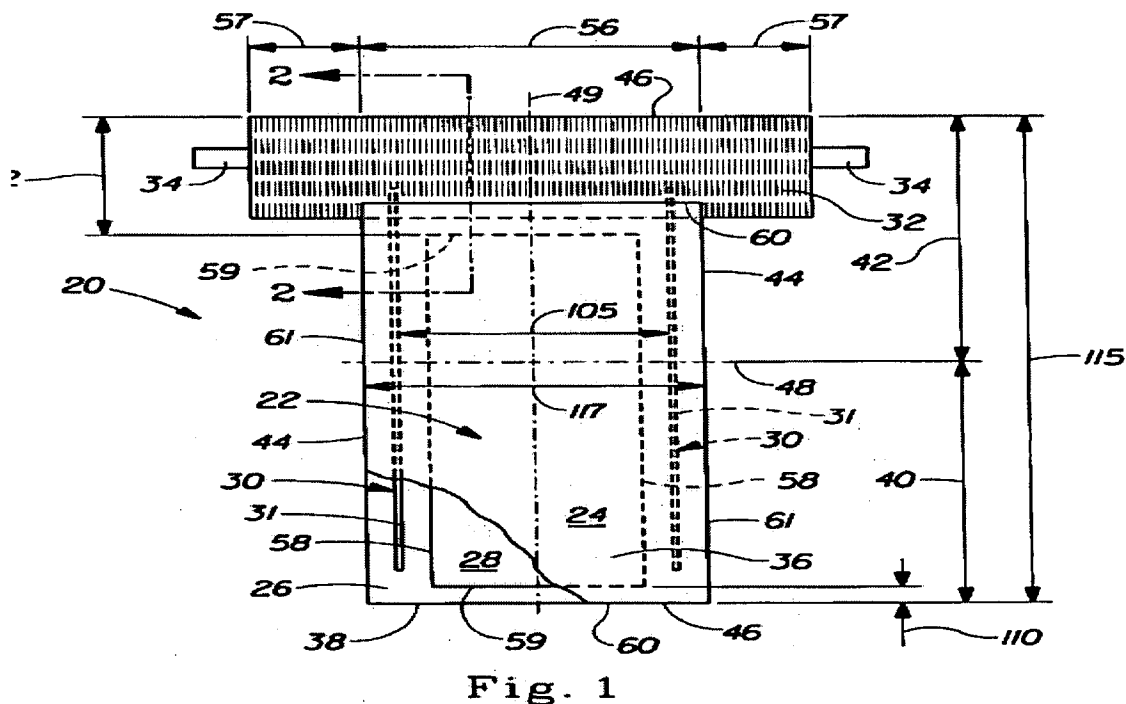


Figure 1 of Roe shows the diaper assembly having elastic leg cuffs (30) and a stretchable waist band (32). (Roe, col. 6, lines 20-28.) Roe further describes that its backsheet (outer cover) is flexible, meaning compliant, and will readily conform to the general shape of the contours of the body. (Roe, col. 9, lines 15-30). Element 30 of Roe depicts the elastic leg cuffs which run the entire length of the diaper.

The present Specification states that the outer cover includes a stretchable fabric layer which can provide an elongation from about 10 to about 200 percent. (Specification 17.) The stretchable outer cover can also provide for substantially permanent deformation of about 10 to 100 percent. (*Id.*) Furthermore, the extensible outer cover may include necked fabrics,

creped fabrics, crimped fabrics, extensible fiber fabrics, bonded-carded fabrics, micro-pleated fabrics, or polymer films. (Specification 18.) Thus, the stretchability of the outer cover of the claimed disposable absorbent article is attributed to a property of the material comprising the outer cover. In addition, the Specification indicates that in the claimed disposable absorbent article the leg elastics are adhered to the outer cover in a stretched position, and thus are not part of the outer cover material. (Specification 9.)

While Roe describes that the back sheet or outer cover can be made of a flexible material that is conforming to the shape of the body, and also describes elastic leg cuffs running the entire length of the back sheet, there is no evidence before us that the actual material comprising the back sheet or outer cover is elastic or extensible. The back sheet of Roe, on the other hand, may comprise a woven or non-woven material, or polymeric films such as thermoplastic films of polyethylene or polypropylene. (Roe, col. 9, ll. 15-30.) Thus there is no suggestion that the films or woven or non-woven materials of Roe are extensible, as they are merely stated to be flexible.

In view of the above, we conclude that Roe does not describe a stretchable outer cover as claimed and the rejection of claims 83-89, 91-92, 100-102 and 106-111 is reversed.

CONCLUSION

In summary, we reverse the anticipation rejection of the claims over Roe and Clear.

Other Issue for Consideration

While we do not find that Roe discloses an outer cover which is stretchable in at least one direction, we recommend that the Examiner consider whether it would have been obvious to include a stretchable outer cover in a disposable absorbent article such as a diaper in view of the disclosures of Morman and Divo (of record). Morman discloses that it is known to use extensible and retractable necked laminate materials in diapers and training pants. (Morman 1.) Divo discloses a topsheet or backsheet of a diaper including a composite elastic member. (Divo, cols. 6 and 8.)

Upon return of the Application to the Examiner it is recommended that the Examiner consider whether a rejection of the claims for obviousness over Roe in view of Morman and/or Divo is warranted.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

REVERSED

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